



U.S. Department of Justice

Federal Bureau of Investigation

Office of the General Counsel

Washington, D.C. 20535

September 15, 2000

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Communications Assistance for Law
Enforcement Act

CC Docket No. 97-213

Dear Ms. Roman Salas:

Enclosed for filing please find an original and nine copies of the Response to Petition to Suspend Compliance Date, filed by the Department of Justice and the Federal Bureau of Investigation in the matter pending before the Commission as captioned above.

Sincerely,

Larry E. Parkinson
General Counsel
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(202) 324-6829

cc: Public Safety and Private Telecommunications Bureau
Wireless Reference Room, Wireless Telecommunications Bureau
International Transcription Service, Inc.
International Reference Room, International Bureau

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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RESPONSE TO PETITION TO SUSPEND COMPLIANCE DATE

Louis J. Freeh, Director
Federal Bureau of Investigation

Honorable Janet Reno
Attorney General of the United States

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**Before the
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On August 31, 1999, the Commission released its Third Report & Order in this proceeding, which modified the “J-Standard” (J-STD-025) by adding certain of the “punch list” capabilities that the Department of Justice and Federal Bureau of Investigation (the government) had petitioned for inclusion under Section 107(b) of CALEA, 47 U.S.C. § 1006(b). *In the Matter of Communications Assistance for Law Enforcement Act*, Third Report & Order, 14 F.C.C.R. 16794 (1999) (Third Report & Order). The Third Report & Order specified that carriers seeking to make use of the “safe harbor” method of compliance (see 47 U.S.C. § 1006(a)) would be required to make these “punch list” capabilities available by September 30, 2001. See Third Report & Order Appendix A, §§ 22.1103(b), 24.903(b), 64.2203(b). The Third Report & Order also set a deadline of September 30, 2001, for the implementation of J-STD-025’s provisions regarding packet-mode communications. See *ibid*.

Various parties petitioned for review of the Third Report & Order in the United States Court of Appeals for the District of Columbia Circuit. On August 15, 2000, that court issued a decision

denying the petitions in part, and granting the petitions in part. See *USTA v. FCC*, 2000 WL 1059852 (D.C. Cir. Nos. 99-1442 *et al.*, Aug. 15, 2000). The court vacated and remanded to the Commission the portions of the Third Report & Order dealing with the four challenged “punch list” capabilities, but denied the petitions for review of the portions of the Third Report & Order dealing with packet-mode information. See *id.* at *16 (slip op. at 25).

On August 23, 2000, the Cellular Telecommunications Industry Association filed a “Petition to Suspend Compliance Date” (Petition) with the Commission, urging the Commission to suspend the September 30, 2001 deadlines for “punch list” compliance (*id.* at 5-6) and delivery of packet-mode information (*id.* at 6-7) “pending further proceedings.” *Id.* at 5. On September 1, 2000, the Commission invited comments on the Petition. See Public Notice DA 00-2022 (rel. Sep. 1, 2000). The government hereby responds.

I. The Two Unchallenged Punchlist Items

As the Commission is aware, see Third Report & Order ¶ 36, the government has for some time been working together with the industry to agree upon a “flexible deployment” scheme that both provides for the prompt implementation of CALEA’s important public purposes and is consistent with business and technical efficiency. See <<http://www.askcalea.net/programs/deployment.html>>. In this same spirit, the government does not oppose the petitioner’s request for a temporary suspension of the compliance date for the two unchallenged “punch list” capabilities. See Petition at 5-6. At the same time, however, it is vital to minimize any further delay in the ultimate implementation of CALEA’s assistance capability requirements. Therefore, the requested suspension is acceptable only if appropriate measures are taken to ensure the prompt achievement of full compliance with these important components of CALEA’s mandate.

Specifically, the government requests that the Commission adopt the following schedule for the remand proceedings with regard to the challenged “punch list” items: (i) public notice regarding the remand proceedings on or before September 30, 2000, (ii) comments within 30 days of the Commission’s Notice, or on or before October 30, 2000, and (iii) reply comments within 30 days of the filing of such comments, or on or before November 29, 2000. The government anticipates that adherence to this schedule would place the Commission in a position to complete the remand proceedings by early next year.

In the government’s view, the process of soliciting public comment and reconsidering the portions of the Third Report & Order vacated by the District of Columbia Circuit lends itself to expedition. The court’s remand order essentially directs the Commission to provide a more thorough explanation of the relationships between key language of CALEA and the challenged “punch list” capabilities. See *USTA v. FCC*, 2000 WL 1059852 at *10-*13 (slip op. at 14-20). The government notes that, as a result of its negotiations with manufacturers over the purchase and implementation of CALEA-compliant equipment and facilities, it now possesses new, concrete information pertinent to matters on which the court requested further analysis. The government intends to submit this information to the Commission in the remand proceedings, and expects that it will facilitate the Commission’s task considerably.

With regard to the new compliance date to be set forth in the Commission’s post-remand order, we note that the Commission’s industry-wide extension order for the unchallenged “core” elements of J-STD-025 concluded that six months was sufficient time for carriers to “purchase, test and install [CALEA-compliant] equipment and facilities throughout their networks” once manufacturers had made such equipment and facilities available. *Memorandum Opinion and Order*

FCC 98-223, released September 11, 1998 ¶ 48 (footnote omitted). It is clear from the course of the government's ongoing negotiations with manufacturers that the manufacturers serving the bulk of the industry have virtually completed the process of developing solutions that provide all of the "punch list" items included in the Third Report & Order. And, as petitioner notes (see Petition at 2), the industry standards-setting body has already developed and published a revision to J-STD-025 that accommodates each of the "punch list" items. Thus, if the Commission on remand adheres to its prior conclusion regarding the "punch list" capabilities included in the Third Report & Order, it should set the new compliance date for the provision of these capabilities no later than six months after the date of release of its post-remand order.

II. Packet Mode Communications

The government opposes the Petition's request that the Commission suspend the September 30, 2001, deadline set in the Third Report & Order with regard to packet-mode communications. See *id.* at 6-7. In making this request, petitioner suggests that the Commission will soon receive petitions arguing that J-STD-025 is "deficient" in its treatment of packet-mode communications because it fails to protect the privacy of communications not authorized to be intercepted, and argues that "the prudent step" would therefore be for the Commission to excuse carriers from the obligation to comply with CALEA with regard to packet-mode information. *Id.* at 7. But the Commission has *already* received and denied such petitions, and the District of Columbia Circuit *upheld* this portion of the Third Report & Order. See *USTA v. FCC*, 2000 WL 1059852, *15-*16 (slip op. at 22-25); see also *id.* at *15 (slip op. at 24) ("The Commission's denial of the petitions to remove packet-mode data from the J-Standard suffers from none of the shortcomings that undermined its handling of the punch list capabilities").

Contrary to petitioner's assertion, the District of Columbia Circuit did not hold that the delivery of a full packet to a law enforcement agency proffering a pen register order would be illegal, thereby "eliminat[ing] one possible implementation of the packet mode assistance requirements." Petition at 6. Rather, the court observed that – as the government has consistently maintained (see *USTA v. FCC*, 2000 WL 1059852 at *16 (slip op. at 25) (quoting the government's brief)) – nothing in section 103 of CALEA obligates carriers to provide law enforcement with information when law enforcement lacks the legal authority to obtain it, and thus J-STD-025 does not "expand[]" law enforcement's authority to obtain the contents of communications. *Id.* at *16 (slip op. at 24). The court did not reach any conclusion, even in *dicta*, as to whether the delivery of full packets to law enforcement on a pen register order *would* be inconsistent with law enforcement's legal authority – the court merely observed that *if* it were, neither CALEA nor J-STD-025 would require it. See *ibid.* (slip op. at 24-25).

Nor does the imminent circulation of the industry report requested by the Commission (Third Report & Order ¶ 56) present any basis for suspending the packet-mode compliance date, as petitioner suggests. See Petition at 7. The Commission has already expressly declined to make the industry's obligations regarding packet-mode communications dependent upon the timing or substance of this report. The Third Report & Order specified that, notwithstanding the process of developing a "permanent solution" that the report was meant to initiate, carriers seeking "safe harbor" would be required to implement the existing packet-mode provisions of J-STD-025 by September 30, 2001. See Third Report & Order ¶ 55. The District of Columbia Circuit upheld this portion of the Third Report & Order, and there is simply no reason for the Commission now to effect an about-face with regard to this "interim" treatment of packet-mode communications. *Ibid.*

It is critical to remember that the current controversy regarding packet-mode communications under J-STD-025 does not involve *whether* carriers must have the capability to deliver full packets, but simply *when* they must make that capability available to law enforcement. The parties are in disagreement as to whether a pen register order provides sufficient legal authority for the delivery of full packets to a law enforcement agency that is capable of “filtering” the call (or non-voice data) contents out of the packet stream. But it is undisputed that in *Title III* cases, where law enforcement agencies have legal authority to obtain the *contents* of wire and electronic communications (see 18 U.S.C. § 2518), carriers *are* obligated to deliver full packets to law enforcement. Thus, even if the Commission were ultimately to adopt a different approach to the delivery of packet-mode information in pen register cases, both CALEA and Title III would still require carriers to have the capability to give law enforcement all packets associated with an intercept subject’s communications. Since carriers must have the capability to deliver full packets to law enforcement regardless of the Commission’s further deliberations regarding pen register issues, there is no possible reason to suspend the deadline for compliance with the J-Standard’s packet-mode provisions altogether, as the Petition requests. To do so would mean postponing the implementation of CALEA’s assistance capability requirements for packet-mode communications not only with respect to pen register cases, where CALEA’s requirements are in dispute, but also with respect to Title III cases, where they are not.

* * * *

The government believes that the schedule proposed above should provide an adequate framework for the correction of the deficiencies in J-STD-025 with regard to the “punch list” items. On the conditions that such a schedule be adopted – and that the September 30, 2001

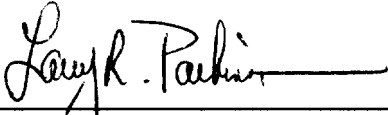
deadline for delivery of packet-mode information remain in place – the government does not oppose the Petition's request for a temporary suspension of the "punch list" compliance date.

DATE: September 15, 2000

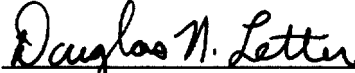
Respectfully submitted,

Louis J. Freeh, Director
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Certificate of Service

I, Myla R. Saldivar-Trotter, Federal Bureau of Investigation, hereby certify that a true copy of the foregoing **Response to Petition to Suspend Compliance Date** was served via hand delivery (indicated by *) or by mail, on this 15th day of September, 2000, to the following parties:

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